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IN THE

Supreme Court of the United States

October Term 1967

No. 880

WILLIAM C. BRAY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Orange.

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WILLIAM C. BRAY,

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Orange.

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Orange, entered in the above entitled case on September 6, 1967.

Opinions Below.

The action was tried in the Municipal Court of the Huntington Beach-Seal Beach Judicial District, County of Orange, State of California, before the Honorable Walter M. Charamza, a Judge of said court, and a jury. No written opinion was rendered by the trial judge, except that prior to trial, on petitioner's motion

to dismiss, the Court rendered a letter opinion to counsel, a copy of which in pertinent part is attached as Appendix A hereto [R. II, 37-38].[1]

The judgment of conviction was affirmed by the Appellate Department of the Superior Court of the State of California for the County of Orange. No written opinion was rendered by said court. A due and timely petition for rehearing was denied by the said Appellate Department without opinion.

No opinion was rendered by the Court of Appeal for the Fourth Appellate District, State of California, denying transfer on certification.

Jurisdiction.

The judgment of the court below [C. T. 78-80].[2] was dated and entered on September 6, 1967, and is attached as Appendix B hereto. A due and timely petition for rehearing [C. T. 81] was denied by the said court on September 19, 1967 [C. T. 88-89]. Petitioner's alternative petition to the court below for certification of transfer of the case to the Court of Appeal pursuant to Rule 63 of the California Rules of Court [C. T. 81] was granted by the said court below on the said September 19, 1967, and the Court certified important questions of law to be settled by the Court of Appeal [C. T. 88-89]. A copy of the aforesaid order and judgment denying petition for rehearing and granting the petition for certification together with a statement of the questions of law to be settled is attached as Appendix C hereto.

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[1]The reference "R. II" is to the Reporter's Transcript and Volume number of proceedings below.

[2]The reference "C. T." is to the Certified Transcript prepared by the clerk of the court below.

The Court of Appeal for the Fourth Appellate District, State of California, by order dated October 20, 1967 and entered on October 23, 1967, denied the transfer on certification. A copy of the said Order is attached as Appendix D hereto.

The decision of the aforesaid Court of Appeal denying transfer in the case herein became final immediately upon its filing on October 20, 1967. California Rules of Court, *Appellate Rules,* Rule 24(a). The California Supreme Court did not order the cause transferred to itself on its own motion within thirty days after the said decision became final [California Rules of Court, Appellate Rules, Rule 28(a)], and a petition for hearing in the California Supreme Court "may not be filed after denial of a transfer to a District Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court" [*Id.,* Rule 28(b)].

By the aforesaid denial of transfer, therefore, the Appellate Department of the Superior Court of the State of California for the County of Orange became the highest court of the State in which a decision could be had. California Constitution, Article VI, §§4, 4b, 4e, 5; California Penal Code 1471; California Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals,* Rule 61 *et seq.*; California Rules of Court, Appellate Rules, Rules 24(a), 28(a), 28(b). *Smith v. California,* 361 U.S. 147, 148, n.2; *Virginia Ry. Co. v. Mullins,* 271 U.S. 220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize conviction of petitioner upon the ground that the book *Just for Kicks* by Donna Powell is obscene and not entitled to constitutional protection, abridge the exercise of freedoms of speech and press and deprive petitioner of his liberty without due process of law, contrary to the free speech and press provisions of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

2. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize conviction of petitioner without proof in the record that petitioner knew the contents of the books herein involved or knew that the contents were obscene, deprive petitioner of his liberty without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press and due process of law provisions of the First and Fourteenth Amendments.

3. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize a wholesale and warrantless search and seizure of unrelated books and magazines in petitioner's retail establishment for the purported purpose of obtaining evidence of "knowledge" and "setting", arbitrarily deprive petitioner of his right to be secure against unreasonable searches and seizures, deprive petitioner of his liberty and property without due process of law, authorize a prior restraint on the circulation of the press, and abridge the exercise of freedoms of speech and press, all contrary to the free speech and press, the search

and seizure provisions and the due process provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

4. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize the introduction into evidence of unrelated books and magazines obtained from petitioner's retail establishment for the purported purpose of proving "knowledge" and "setting" arbitrarily deprive petitioner of his liberty and property without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

5. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize a conviction of petitioner without competent proof that the book involved herein exceeds the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity; or appeals to prurient interest; or is utterly without social importance, and where the record affirmatively establishes that the book is not obscene and is entitled to constitutional protection, deprive petitioner of his liberty and property without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States and the provisions of California Penal Code §§311 and 311.2 are set forth in Appendix E hereto.

Statement of the Case.

(a) Petitioner was charged in a five-count complaint [C. T. 2] with violations of California Penal Code §311.2. Each of the counts of the complaint was in similar language. Count I charged a violation of the state obscenity statute by the sale of a book entitled *Just for Kicks* [Peo.'s Ex. 6; R. I, 33]. Count II of the complaint involved the book entitled *Surf Broad* [Peo.'s Ex. 1; R. I, 33]. Count III involved the book entitled *Madam Butch* [Peo.'s Ex. 2; R. I, 33]. Count IV involved the book entitled *Pay the Devil* [Peo.'s Ex. 4, R. I, 91-92]. Count V involved the book entitled *Leather Girls* [Peo.'s Ex. 5, R. I, 91].

The cause came on for trial before the Honorable Walter W. Charamza, Judge of the Municipal Court of the Huntington Beach-Seal Beach Judicial District, County of Orange, State of California, and a jury. The jury returned a verdict of not guilty with respect to Counts II, III, IV and V of the aforesaid complaint, and a verdict of guilty with respect to Count I of the said complaint, to wit, a violation of California Penal Code §311.2 on October 24, 1965 involving the book entitled *Just for Kicks* [C. T. 14-18].

(b) With respect to the book *Just for Kicks,* the sole book involved in these proceedings, the prosecution at the trial offered a witness, Sharon Beauchamp [R. I, 25], a secretary for the City of Huntington Beach in the Detective Bureau of the Police Department. On October 24, 1965, the witness visited the retail establishment of petitioner and purchased from a female clerk the said book *Just for Kicks* by Donna Powell for which she paid the price of $.95 [R. I, 26-27]. No one else was present at the time of the pur-

chase [R. I, 26]. The witness did not desire to purchase the book for herself; she had simply been sent to buy the book [R. I, 28].

On behalf of petitioner, Dr. Carolyn Sturak, the recipient of a Master's Degree and a Ph. D. Degree from the University of California at Los Angeles in American Literature [R. IV, 3-4], testified that she had extensive expertise in the field of novels and literature, including the genre of paperback books involved in the complaint herein [R. IV, 5]. The witness had read each of the books charged in the complaint [R. IV, 5-6] and testified that these books were the same general type as the many books she had had occasion to read during her lifetime [R. IV, 6]. The witness testified that she had read such works as *Fanny Hill, Tropic of Cancer,* and other books previously held entitled to constitutional protection by rulings of the courts and that, based upon said readings and her experience, none of the books named in the complaint substantially exceeded customary limits of candor in the description of sex or nudity [R. IV, 7-9, 16, 19, 24]. Specifically, with respect to the book *Just for Kicks,* the witness testified that the description of sexual activities contained in the book did not go beyond customary limits of candor in the description of such activities and that the book had social importance [R. IV, 19-24].

Petitioner, testifying on his own behalf [R. V, 19], stated that he had been a resident of the City of Huntington Beach for approximately thirty years; that he had operated a grocery business with his father for about fifteen years; and for the past three years had been at his present establishment in the liquor business [R. V, 19-20]. Petitioner stated that in addition

to books and magazines which were on racks in the store, the establishment also sold various items which could be found in supermarkets and grocery stores, such as glassware, canned goods, cigarettes, delicatessen and the like [R. V, 22]. Petitioner testified that the various books and magazines which he received were not ordered by him but simply delivered by truck once a week and placed on the racks by a deliveryman. Petitioner testified that he had not read the books named in the complaint, and specifically with respect to the book *Just for Kicks* petitioner could not recall ever having seen the book [R. V, 24-28, 35, 38, 39]. The petitioner testified that he had no knowledge that any of the books named in the complaint were obscene and stated that he never considered the books carried in his store to be obscene [R. V, 49].

On rebuttal, the People offered Dr. David Henry Malone, Chairman of the English Department and the Comparative Literature Program at the University of Southern California [R. VI, 6]. The witness testified that in his opinion there were only "two tests" for obscenity [R. VI, 39]; that books like *Tropic of Cancer* and Norman Mailer's *American Dream,* in his opinion, exceeded the customary limits of candor [R. VI, 33, 61]; that the mode of descriptions so far as candor was concerned in the book here involved, *Just for Kicks,* was about the same as the descriptions contained in *Tropic of Cancer* [R. VI, 82]. The witness conceded that the book contained a sketch of a plot, contained some conflict between characters in the book [R. VI, 28-29], and that while the book was in his opinion without social importance as literature he could not answer from the point of view of a sociologist or a psychiatrist or a historian [R. VI, 24].

William K. Tynes, an Investigator with the District Attorney for Orange County [R. I, 56], testified on behalf of the prosecution that on April 23, 1966, without a search warrant, he seized and removed various books and magazines from petitioner's retail establishment [R. I, 57-59]. The witness had been instructed prior to the seizure of the aforesaid material by a Lieutenant in the Police Department to search and seize all books at petitioner's establishment of the same "type" as a book entitled *Surf Broad* which the said Lieutenant had previously purchased [R. I, 76]. The witness himself had never read the book *Surf Broad* and, indeed, did not read any of the books that he seized [R. I, 77]. Despite the fact that he had not read the books which he seized he nevertheless was of the opinion that they were "similar" to the book which the Lieutenant had named [R. I, 80]. The witness also seized magazines upon the theory that they appeared to him to be "of some value in evidence" [R. I, 81] and because they were again "similar type material" [R. I, 82]. The books seized by the said witness were admitted by the trial court on the issue of "knowledge" and as evidence of "setting" [Peo.'s Ex. 16 (19 books); R. II, 32; R. III, 4]. The magazines seized by the said witness were admitted into evidence to show "setting" but not on the issue of "knowledge" [Peo.'s Ex. 15 (27 magazines), R. II, 32; R. III, 4]. The aforesaid material was admitted into evidence for the jury's consideration without regard to the contents of the material [R. III, 4]. Also admitted to show "knowledge" and "setting" were five other unrelated books purchased on a previous occasion by a police officer [Peo.'s Exs. 10-14; R. II, 31; R. III, 3-4].

How Federal Questions Are Presented.

Prior to trial, petitioner demurred to the complaint [C. T. 3-5] and moved to dismiss the proceedings upon the ground that the books named in the complaint were entitled to constitutional protection [C. T. 7-13]. In denying the said demurrer and motion to dismiss, the trial court held that the books named in the complaint were not entitled to constitutional protection as a matter of law [Appendix A; R. II, 37-38].

Objections were made throughout the trial to the admission of the books involved in the complaint upon the ground that the material was entitled to the protection of the "First Amendment to the United States Constitution applicable to state laws through the Fourteenth Amendment" [R. I, 30-32], and to the admission of the unrelated books which had been illegally seized or purchased as aforestated upon similar constitutional grounds [R. I, 34-55, 59-75, 82-87, 97-98; R. II, 17-37; R. III, 3-4].

At the conclusion of the People's case, petitioner moved the court for an acquittal and dismissal of the charges based upon the grounds that the books involved in the complaint were entitled to constitutional protection under the First and Fourteenth Amendments; that the prosecution had failed to present any evidence to support the essential ingredients of the offense charged in the complaint; that the record was barren of any proof of scienter on the part of petitioner, all in violation of the constitutional guarantees [R. III, 6-35]. At the conclusion of the entire case, petitioner again renewed the motions for acquittal and dismissal upon all the grounds which had been argued at

the close of the People's case [R. VII, 2-3]. A motion for a new trial based on similar constitutional grounds was thereafter denied [C. T. 20-20a].

Petitioner was sentenced to pay a fine of $1,000.00; a sentence of fifteen days in the County Jail was suspended and petitioner placed on three years' summary probation [C. T. 48].

On appeal to the court below, petitioner raised the same constitutional questions, to wit, that the book here involved was entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution; that failure to prove scienter on the part of petitioner deprived petitioner of liberty and property without due process of law under the First and Fourteenth Amendments; that the introduction of illegally seized material violated petitioner's rights under the First, Fourth and Fourteenth Amendments; that failure to prove the statutory elements of obscenity was also contrary to the provisions of the First and Fourteenth Amendments [C. T. 70, 76]. Similar constitutional issues were raised on the petition for rehearing [C. T. 81]. In granting the alternative petition for certification of transfer, the court below certified important questions of law which were listed as follows: "Whether the constitutional guarantees of freedom of expression prevent the conviction herein"; "Whether irrelevant, immaterial, and illegally-seized material was introduced into evidence in violation of the California and United States Constitution"; "Whether P.C. Sections 311 and 311.2, as construed and applied by the instructions given relating to *scienter*, are unconstitutional in view of the provisions of the United States and California Constitu-

tions"; and "Whether P.C. Sections 311 and 311.2, as construed and applied by the trial court, violate constitutional guarantees of freedom of speech, due process, and equal protection of the law". [Appendix C; C. T. 88-89].

Reasons for Granting the Writ.

1. In the constitutional sense, the book *Just for Kicks* by Donna Powell involved herein is neither obscene nor otherwise unlawful. The judgment of conviction based upon the aforesaid book results in an unconstitutional application of the state obscenity statute, contrary to the express guarantees of the free speech and press and due process provisions of the First and Fourteenth Amendments.

The book herein is comparable in its description of sex to those writings which have been found not to exceed the limits of candor in the Nation as a whole, or to have some social importance justifying their protection under the First Amendment. So far as the essential elements of obscenity are involved, as was defined by this Court in *Roth v. United States,* 354 U.S. 476; *Jacobellis v. Ohio,* 378 U.S. 184; *Memoirs v. Massachusetts,* 383 U.S. 413; and *Redrup v. New York,* 386 U.S. 767, there is no significant difference between the book herein involved and the material deemed constitutionally protected in the cases decided by this Court and other federal and state courts. See, *Grove Press v. Gerstein,* 378 U.S. 577 (*Tropic of Cancer*); *Tralins v. Gerstein,* 378 U.S. 576 (*Pleasure Was My Business*); *Memoirs v. Massachusetts,* 383 U.S. 413 (*Fanny Hill*); *Redrup v. New York,* 386 U.S. 767 (*Lust Pool* and *Shame Agent*); *Aday v. United States,* 388 U.S. 447 (*Sex Life of a Cop*);

Books, Inc. v. United States, 388 U.S. 449 (*Lust Job*); *Quantity of Copies of Books v. Kansas,* 388 U.S. 452 (*Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinners Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden* and *Flesh Avenger*); *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448 (*Sin Whisper*); *Keney v. New York,* 388 U.S. 440 (*Sin Servant, Lust School* and *Lust Web*); *Mazes v. Ohio,* 388 U.S. 453 (*Orgy Club*); *Friedman v. New York,* 388 U.S. 441 (publications entitled "Bondage Boarding School", "English Spanking School", "Bound and Spanked", "Sweeter Gwen", "Travelling Saleslady Gets Spanked", "Bound to Please", "Bizarre Summer Rivalry", "Heat Wave" and "Escape Into Bondage, Book No. 2"); *Sheperd v. New York,* 388 U.S. 444 (sets of photographs and the following publications: "Promenade Bondage", "Spanking Nurses", "Spanking Sisters" and "Bondage"); and *Avansino v. New York,* 388 U.S. 446 (packets of photographs and the publication entitled "Promenade Bondage Vol. 4".[3]

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[3]See also, *Austin v. Kentucky,* 386 U.S. 767 (magazines entitled "Spree", No. 38, and "High Heels", Vol. 2, No. 6); *Gent v. Arkansas,* 386 U.S. 767 (magazines entitled "Gent", "Swank", "Bachelor", "Ace", "Cavalcade", "Gentleman" and "Sir"); *Rosenbloom v. Virginia,* 388 U.S. 450, ("Solis", a magazine printed in German, and also 107 other nudist magazines); *Ratner v. California,* 388 U.S. 442 (motion picture film "Honey Bee"); *Cobert v. New York,* 388 U.S. 443 (motion picture films "Jane Palmer No. 2", "M. Jordan" and "Jayne Tracy"); *Schackman v. California,* 388 U.S. 454 (girlie pictures in coin operated peep shows: D-15, 0-12, 0-7, B-1 and B-19); *Central Magazine Sales, Ltd. v. United States,* 88 S. Ct. 235 (girlie magazine "Exclusive", and nudist magazines "International Nudist Sun", No. 16, and "Review International", No. 6); *Potomac News Co. v. United States,* 88 S. Ct. 233 (male nudist magazine "Hellenic Sun Number Two"); *Connor v. City of Hammond,* 88 S. Ct. 234 ("girlie" magazines); and *Chance v. California,* 88 S. Ct. 253 (nude pictures).

See also, *Grant v. United States,* 380 F. 2d 748 (9 Cir. 1967), decided after the aforesaid decisions of this Court reversing a judgment of conviction and holding that the books *Swish! Bottom!, Screaming Flesh* and *The Holdout* were entitled to constitutional protection; *Commonwealth v. Dell Publications, Inc., et al.,* 233 A. 2d 840 (Pa., 1967) holding the book *Candy* to be entitled to constitutional protection.

Neither in language nor in theme does the book herein approach the candor of discussion or the explicitness of language that is found in writings of many authors generally accepted and widely read by the public. The book herein contains a plot and story-line with characters and incidents relevant to such plot and theme. As Dr. Sturak, the expert witness testifed on behalf of petitioner, the description of sexual activities contained in the book herein are no more candid than those found in classical literature and in modern contemporary works [R. IV, 19-23]. The witness also testifed that the book had social importance, reflecting as it does the modern problems of social responsibility and the influences of the use of drugs in social relationships [R. IV, 23-24].

The case herein does not involve a statute which reflects a "specific and limited state concern for juveniles", nor does the case involve any "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it", nor was there any evidence in the case herein of the sort of "pandering" which the Court found significant in *Ginzburg v. United States.* See, *Redrup v. New York,* 386 U.S. 767. As the record reveals, an employee of the Police Department was

sent to petitioner's retail establishment for the specific purpose of purchasing the book herein involved, and petitioner was not even at the premises when the book was purchased from a female clerk.

In view of the record herein and the decisions of this Court, it is submitted the judgment of conviction rendered herein cannot stand in the light of the protective provisions of the First and Fourteenth Amendments.

2. The record is barren of any proof of scienter on the part of petitioner. The record is uncontradicted that the petitioner had no knowledge of the contents of the writing, and it is equally clear that petitioner had no reason to believe, nor did he believe, that the book was obscene or otherwise unlawful. The sole witness produced by the prosecution with respect to the book involved herein testified that she was an employee of the Police Department, and purchased the book not for herself but simply at the behest of the police. The book was purchased from a clerk in the retail establishment; no one else was present at the time of the sale. Petitioner testified that he had never read any of the books in his store, including the book here involved, and testified that he could not recall ever having seen the book.

In short, there is nothing in the record to show that petitioner either knew the contents of the writing or knew that the contents were obscene as alleged in the complaint. The conviction under the obscenity statute herein, as construed and applied to petitioner to justify his conviction without the slightest proof of scienter, violates the free speech and press and due process provisions of the First and Fourteenth Amendments. *Smith v. California*, 361 U.S. 147.

So far as issues of petitioner's allegedly unlawful knowledge and intent are concerned relative to the purported obscenity of the book herein involved, there is no probative evidence in the record to support the judgment of conviction. Under the governing standards elucidated in the opinions of this Court, the State manifiestly failed to meet the strict burden of proof imposed upon the State under the Constitution when First Amendment rights are involved. *New York Times Co. v. Sullivan,* 376 U.S. 254; *Garrison v. Louisiana,* 379 U.S. 64; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Schneiderman v. United States,* 320 U.S. 118; *Baumgartner v. United States,* 322 U.S. 665; *Hartzel v. United States,* 322 U.S. 680. See also, *Thompson v. Louisville,* 362 U.S. 199, 206, n.13.

3. The state obscenity statute has been construed to authorize a wholesale and warrantless search and seizure of books and magazines in a retail establishment for the purported purpose of obtaining evidence of "knowledge" and "setting". In the view of the State, a police officer may enter a retail establishment where books and magazines are sold and seize all books and magazines which he, in his own subjective wisdom, may deem to be "evidence" which bears on issues of "knowledge" and "setting" relative to a specific book sold months before by a clerk to a police agent.

Thus, in the case herein, numerous books and magazines, constitutionally protected material, were seized on April 23, 1966, without warrant, and removed from the premises purportedly to be used as evidence on "intent" and "setting" relative to the sale of the book herein involved on October 24, 1965. The question as to whether or not books and magazines shall

be seized in a retail establishment was left to the unfettered decision of an investigator for a district attorney with a resultant suppression of material which ordinarily enjoys the protection of the First Amendment and to which the community is ordinarily entitled to access.

The approval of the exercise of such unbridled power by officials of government raises questions of great constitutional significance. This Court has held that state procedures which authorize the seizure of material by a police officer ordinarly entitled to the protection of the First Amendment, without any prior approval by a judicial officer, does violence to the First, Fourth and Fourteenth Amendments to the United States Constitution. *Marcus v. Search Warrants of Property,* 367 U.S. 717; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205; *Stanford v. Texas,* 379 U.S. 476. The consequence of permitting arbitrary seizures by police officers of material on the pretext that such material is deemed "obscene" or deemed necessary as evidence of "knowledge" or "setting" is the suppression of such material and the withholding from the public for lengthy periods of time of communications which are entitled to constitutional protection. The procedures which have been authorized here by the State permits police officers and other law enforcement officers to exercise an unfettered discretion without any step in the procedure before the seizure designed to focus searchingly on the question of whether or not the material can possibly have any bearing on issues of knowledge or setting.

The state obscenity statute as thus construed and applied creates a system of prior restraint of expression

limitless in scope. Such a system "comes to this Court bearing a heavy presumption against its constitutional validity". *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70. The statute permits wholesale seizures of writings contrary to the provisions of the First and Fourth Amendments as subsumed into the due process provisions of the Fourteenth Amendment. To seize books and magazines under the circumstances presented in the record herein, and suppress their circulation, is to create a judicial "instrument for stifling liberty of expression" (*Marcus v. Search Warrants, supra,* 367 U.S. at 729) which the Bill of Rights was intended to outlaw. *Freedman v. Maryland,* 380 U.S. 51.

4. All of the unrelated material so illegally seized from petitioner's store and other unrelated books purchased on different occasions were admitted into evidence by the trial court on the purported basis of proving "knowledge" or "setting". It is submitted that it was constitutionally impermissible to place such unrelated evidence before the jury.

On the issue of scienter, the only question presented in the case was whether or not the petitioner knew the contents of the book *Just for Kicks,* and whether he knew that the contents were obscene, as alleged. On this issue, the prosecution was unable to present any evidence. The fact that petitioner had a retail establishment which, among other things, contained books and magazines dealing with sex could in no way establish that petitioner knew the contents of the specific book *Just for Kicks,* or in any way prove that petitioner knew that this specific book was unlawful as alleged. The covers and blurbs on the unrelated books and magazines which were introduced into evidence were

no different in any significant degree from the covers and blurbs on books and magazines which have been held to be entitled to constitutional protection by decisions of this Court and other state and federal courts.

The introduction of all of the said material to show "setting" was equally impermissible. There was no evidence in the record that petitioner sold the specific book involved herein, nor any evidence that petitioner made any statement or representation with respect to the specific book *Just for Kicks*. The book in fact was purchased from a clerk by a police agent when nobody else was present in the establishment. The fact that numerous magazines and books were sold on book racks in the petitioner's store in no way established, it is submitted, the alleged obscenity of the specific book involved herein, or the knowledge or intent of petitioner with respect thereto.

The construction of the state obscenity statute to permit the introduction of this totally unrelated material on the issue of knowledge and setting is merely an indirect method of seriously restricting the circulation of books and magazines entitled to constitutional protection and to impose guilt upon booksellers even though they had not the slightest notice of the character of the books sold. The effect of the rulings by the court below is to erode fundamental freedoms of speech and press and due process guarantees by holding a retail bookseller criminally liable for the sale of an allegedly obscene book, "wholly apart from any scienter on his part regarding the book's obscenity." *Smith v. California,* 361 U.S. 147, 160.

The fact that a retail bookseller has other books and magazines in his establishment dealing with sex and nudity in no way establishes, it is submitted, that a particular book charged in a complaint is obscene or that the retailer knew it to be obscene. Sex is not obscenity, and as Justice Harlan stated in *Roth v. United States,* 354 U.S. 476, 497: "Every communication has an individuality and 'value' of its own." The wholesale introduction of unrelated books and magazines into evidence in an obscenity prosecution for the purported purpose of establishing "knowledge" or "setting" subverts the constitutional safeguards for freedoms of speech and press. Books do not become obscene by association, and guilty knowledge cannot be inferred from lawful possession. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall,* 357 U.S. 513, 521.

5. On its direct case, the prosecution made no attempt to prove that the book herein, *Just for Kicks,* substantially exceeds contemporary standards in the depiction or representation of sex and nudity; or appeals to a prurient interest; or is utterly without social importance. All that was introduced into evidence was the book itself. The oral and documentary testimony introduced into evidence by petitioner on his behalf established that the book was in all respects comparable to other writings which had been held constitutionally protected and which freely circulated throughout the Nation. With respect to the book involved herein, the

prosecution's only witness on rebuttal conceded that the book was no more candid than such books as *Tropic of Cancer* and other books which have been held to be constitutionally protected and freely circulate in the Nation. Moreover, the witness admitted that he could not testify with respect to the social importance of the book in general but only with respect to its importance as literature. In short, the prosecution failed to prove the essential ingredients of the offense charged in the complaint, and the affirmative evidence in the case establishes that the book does not exceed contemporary standards, nor appeal to prurient interest; and has social importance.

Thus, petitioner here has been convicted under a statute in which there was a failure to prove the essential elements of the alleged crime. A state criminal procedure which permits conviction without proof of the existence of every element necessary to constitute the crime charged does violence to the due process provisions of the Constitution, and "where the transcendent value of speech is involved", due process certainly requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser v. Randall,* 357 U.S. at 526. See also, *Tot v. United States,* 319 U.S. 463; *Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *New York Times Co. v. Sullivan,* 376 U.S. 254; *Garrison v. Louisiana,* 379 U.S. 64; *Freedman v. Maryland,* 380 U.S. 51.

Unless the burden of proof in obscenity prosecutions is meticulously maintained, constitutionally protected writings may be suppressed, and individuals involved in their circulation punished, under unproved charges.

The right to be heard before condemnation is hardly meaningful if the accuser is relieved of the burden of proving his accusation. Rights guaranteed by the First and Fourteenth Amendments cannot be protected where a criminal trial is drained of the basic elements of a fair trial, where "the whole proceeding is a mask". *Moore v. Dempsey,* 261 U.S. 86, 91. Plainly, if it is a sheer denial of due process to convict a person upon a charge not made, or a charge not tried, it is equally arbitrary to rest a conviction upon a charge not proved. *DeJonge v. Oregon,* 299 U.S. 353, 362; *Cole v. Arkansas,* 333 U.S. 196, 201; *Thompson v. Louisville,* 362 U.S. 199, 206.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Opinion of Hon. Walter W. Charamza, Judge of the Municipal Court.

"People versus Bray, CR 15335.

"Gentlemen: The Court has examined all of the books named in the subject case as set out in Counts I through V. All of the comparative material submitted has been examined. The books charged and the comparative material submitted has been examined. The books charged and the comparative material have been evaluated in light of the decisions of the United States Supreme Court, the California Appellate Courts and the provisions of the Penal Code of California.

"It is the Court's conclusion that none of the books set out in Counts I through V are constitutionally protected as a matter of law. The request that the Court dismiss the charges on that basis is denied."

"Walter W. Charamza"

(October 14, 1966)

APPENDIX B.

Judgment of the Appellate Department.

Entered in the Register of Actions on September 6, 1967 W. E. St John, County Clerk, by L. A. Brizzolara, Deputy.

Filed: Sept. 6, 1967.

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff and Respondent vs. William C. Bray, Defendant and Appellant. No. AP-484 On Appeal from the Municipal Court of the Huntington Beach-Seal Beach Judicial District, Hon. Walter W. Charamza, Judge.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby affirmed and the cause remanded to the Municipal Court for further proceedings.

Dated this 6th day of September, 1967.

/s/ William S. Lee
William S. Lee, Judge

/s/ William L. Murray
William L. Murray, Judge

/s/Herbert S. Herlands
Herbert S. Herlands,
Presiding Judge (Acting)

APPENDIX C.

Order Denying Petition for Rehearing and Granting Certification With Questions of Law to Be Settled.

Entered in the Register of Actions on Sept. 19, 1967 W. E. St John, County Clerk, by L. A. Brazzolara, Deputy.

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff and Respondent, vs. William C. Bray, Defendant and Appellant. No. AP-484 on Appeal from the Municipal Court of the Huntington Beach-Seal Beach Judicial District, Hon. Walter W. Charamza, Judge.

Filed: Sept. 19, 1967.

A Petition for Rehearing and Alternative Petition for Certification having been filed in this Court on September 12, 1967, and said Petition having been considered by this Court:

It is Ordered that the Appellant's Petition for Rehearing is denied, and that Appellant's Alternative Petition for Certification that the case be transferred to the Court of Appeal be, and it is hereby granted.

In accordance with sub-paragraph (e) of Rule 63 of the California Rules of Court, this Court certifies that the important questions of law to be settled are as follows:

(a) Whether the constitutional guarantees of freedom of expression prevent the conviction herein;

(b) Whether irrelevant, immaterial, and illegally-seized material was introduced into evidence in

violation of the California and United States Constitutions;

(c) Whether P.C. Sections 311 and 311.2, as construed and applied by the instructions given relating to *scienter,* are unconstitutional in view of the provisions of the United States and California Constitutions;

(d) Whether P.C. Sections 311 and 311.2, as construed and applied by the trial court, violate constitutional guarantees of freedom of speech, due process, and equal protection of the law.

The judgment of conviction herein was entered in the Huntington Beach-Seal Beach Judicial District, a Municipal Court, and the only judgment of the Superior Court herein was the judgment affirming said conviction rendered by the Appellate Department of the Superior Court, in and for the County of Orange, on September 6, 1967.

Dated this 19th day of September, 1967.

/s/ William S. Lee
William S. Lee, Judge

/s/ William L. Murray
William L. Murray, Judge

/s/ Herbert S. Herlands
Herbert S. Herlands,
Presiding Judge (Acting)

APPENDIX D.

Order Denying Transfer on Certification.

Court of Appeal—State of California, Fourth Appellate District, Division II.

Filed: Oct. 23, 1967.

People, etc. vs. William C. Bray. 4 Crim. No. 3124.

By the Court: Transfer on Certification is DENIED.

Dated October, 20 1967.

Copies to: County Clerk, Santa Ana, 92701, Atty. Genl. L.A. 90012, Clerk, Municipal Court, 520 Magnolia, Huntington Beach Dist. Attny Courthouse, Santa Ana, 92701, Stanley Fleishman, 1680 N. Vine St., L.A. 90028.

McCabe *P. J.*

APPENDIX E.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. California Penal Code, §311 provides:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description

or representation of such matters and is matter which is utterly witout redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

5. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

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IN THE

Supreme Court of the United States

October Term, 1967
No. 880

WILLIAM BRAY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

Statement of Facts.

Lt. Burt Eckstrom of the Huntington Beach Police Department testified that the petitioner, Mr. William Bray, as sole owner, had operated the Top Hat Liquor Store for two or three years in Huntington Beach, California [R. I, 15, 16] and that he sold candy, chewing gum, liquor and grocery items as well as books [R. I, 5]. Immediately as a person entered the store, he could see a rack of books and magazines directly in front of him and just inside the door [R. I, 5]. Lt. Eckstrom examined certain photographs and stated that they fairly represented the appearance of the store [R. I, 23, 34].

On January 7, 1966, Lt. Eckstrom purchased four books, one of which was *Surf Broad* by Ray Train (Satan Press), charged in Count II of the Complaint

[R. I, 8]. In a conversation with the petitioner, Lt. Eckstrom stated he had read some of the Satan Press Books being sold in the store and that in one of the books an act of sodomy between a pony and a woman was described which he felt was obscene. Petitioner replied that the Kinsey Report indicated that five per cent of American women receive sexual satisfaction from relationships with animals. Mr. Bray went on to say that ninety-nine per cent of the people who entered his store wanted this particular type of book and that Lt. Eckstrom must be one of that one per cent who objected [R. I, 10].

Subsequently, Lt. Eckstrom purchased 5 books entitled *Everybody Wins, Sweet Sixteen, Nightmare in Leather, Sex Challenge,* and *Lust Can't Hide.* These books [Peo's Exs. 10-14] were introduced to show petitioner's knowledge of the nature of the material sold in his store and to show the setting in which the books were sold, *i.e.,* a type of advertising meant to appeal to the erotic interest of the customers [R. I, 16, 20].

On April 13, 1966, *Madame Butch* was purchased in petitioner's store by Lt. Eckstrom [Peo's Ex. 2, R. I, 21, 22, 33].

In October of 1965, a secretary for the Huntington Beach Police Department bought *Just for Kicks* for $.95 in petitioner's store [Peo's Ex. 6, R. I, 26, 27, 33].

Petitioner was arrested on a warrant by Lt. Eckstrom on April 23, 1966.

William K. Tynes, District Attorney's Investigator, testified that on April 23, 1966, at the time of petitioner's arrest, he searched The Top Hat Liquor Store and obtained certain nudist magazines and paperback

books as samples of the type of operation being conducted inside the store. Only samples were taken, not the complete supply of books [R. I, 56, 81, 98]. The books in Counts IV and V of the Complaint were seized at this time by Mr. Tynes [Peo's Exs. 4 and 5, R. I, 98]. The other books not specifically charged were admitted to show the defendant's knowledge of the contents of books sold in his store and also to show that he was purveying textual material openly advertised to appeal to the erotic interest of his customers; the magazines were not admitted to show his knowledge, but were admitted for the "purveying" issue [R. II, 32, III, 4].

A route salesman for the company which distributed the books in question, Jack Nelson, testified he had delivered books to The Top Hat Liquor Store during the period in question and that during one of his visits to the store he engaged in a conversation with the petitioner about the book *Surf Broad.* The petitioner stated *Surf Broad* was a very rough book and asked if there was a chance of being arrested because of it or because of the other Satan Press books which Mr. Nelson described as "generally a rough line of books" [R. II, 7, 10]. The petitioner told Mr. Nelson he had read *Surf Broad* and used the words "a damn rough book" in describing the contents [R. II, 7]. Mr. Nelson testified that petitioner regularly kept a book behind the counter, near the cash register, to read in lulls between customers [R. II, 11].

All five of the books charged in the Complaint were read to the jury from beginning to end [R. II, 102]. (The reading of the books was not made a part of the transcript). The People rested [R. III, 3], and there-

after the court refused to grant a defense motion for an advised verdict [R. III, 35].

Dr. Carolyn Sturak, Ph.D. in American Literature [R. IV, 4], testified that none of the books charged in the Complaint were obscene [R. IV, 9, 16, 19 and 24, 26, 45]. Elaborating, she testified that since Henry Miller described lesbian adventures in *Tropic of Cancer,* the lesbian adventures in the books herein charged could not be beyond the customary limits of candor [R. IV, 11]. Further, she testified the books all had social importance [R. IV, 15, 17, 23, 26]. In speaking of *Just For Kicks,* the best that could be said was: ". . . if you are going to enjoy sex, it's much nicer if you have no responsibility for it . . ." [R. IV, 23]. At one point she stated the book *Leather Girls* would have social importance to a sociologist or an anthropologist studying the American way of life twenty years from now [R. IV, 15], and that *Surf Broad* was "theological" in nature [R. IV, 23]. In referring to the appearance and the outside covers of the various books and magazines in evidence and also the five books charged, she stated that a person could form an opinion about the general subject matter of the material, *i.e.,* "an opinion of what it is purported to be like . . ." [R. IV, 33].

The petitioner, Mr. Bray, testified he had been selling these books in his store for about two and one half years [R. V, 20]. He further stated he recognized some of the items in evidence by remembering custom-

ers bringing them to the counter for purchase [R. V, 48].

Mr. Bray further testified that since the books and magazines are visible from the outside of his store to a person who is standing near the door [R. V, 45], since there is a hamburger shop nearby, and since children regularly come into his store for candy and pop, he felt the "Adults Only" sign should be placed above the magazines and books [R. V, 51, 49].

Referring to the book *Surf Broad,* published by Satan Press, Mr. Bray stated that when the court action came about, he started thinking about *Surf Broad,* and recalled that he had heard of it some place before. He elaborated by stating Jack Nelson at one time had said *Surf Broad* was a good seller [R. V, 26, 27]. At various times he recalled conversation arising regarding the possibility that he might become involved with the law for selling these books [R. V, 28]. He knew all his books had to do with sex and nudity [R. V, 54], and that Lt. Eckstrom had told him about the "human-animal" sex act, but that he continued to sell books of that same general nature [R. V, 51, 52]. He did not sell any well-known books or magazines such as *Life, Look* or *Field and Stream* [R. V, 54].

Petitioner denied reading any of the books, but stated that he might open the cover of one or two or even more of the magazines and look at the pictures [R. V, 47].

On rebuttal, Mr. David H. Malone, Chairman of the English Department and Chairman of the Comparative

Literature Program at the University of Southern California, was called by the Respondent [R. VI, 6], and testified his qualifications included study and teaching assignments at the University of North Carolina, Louisiana State University, Auburn University, University of Vienna, Phillip's University in Germany and the Sorbonne in Paris. He had been a Fulbright scholar at one time in his career and had also been the recipient of Ford Foundation funds for the purpose of study and teaching in Europe. At the time of his testimony, Dr. Malone supervised 34 professors and 25 teaching assistants at the University of Southern California. He had presented papers to various professional organizations, as well as having authored articles in several professional publications [R. VI, 6, 11].

Based on his education and experience and his knowledge of the type of books sold in the United States [R. VI, 23], Dr. Malone testified the book *Just for Kicks,* as well as the other four books, went substantially beyond the customary limits of candor [R. VI, 24, 30, 31].

After considering the witness's qualifications, the trial judge stated that he could testify about the prurient appeal of the books as well as the lack of social importance [R. VI, 16]. Thereafter he testified the book *Just For Kicks*, and the other four books charged were utterly without redeeming social importance and that the exclusive appeal is to prurient interest [R. VI, 17, 23, 24, 32].

Elaborating on the social importance concept, Dr. Malone said, "*Any* book has social importance because it is a manifestation of our society at a certain date and [it] would be used to study such phenomenon, but I would say it (*Just For Kicks*), is without redeeming social importance as literature" [R. VI, 24], (emphasis added). He further stated the books could have historical importance only to the extent that they would suggest what pornography does in any era, *i.e.,* exhibit an appeal to prurient interest [R. VI, 27]. The book *Just For Kicks* was definitely not written in the style of a scientific study [R. VI, 30]; and the artistic value, if any, existed only for the purpose of providing a series of prurient episodes [R. VI, 25]. *Just For Kicks* advocates no idea other than sex for the purpose of prurient appeal [R. VI, 27].

In describing the type of writing contained in these books, Dr. Malone testified that generally the books contained a sketch of a plot which was merely a pretense for a series of erotic depictions; he could detect no significant sign of character development and stated it was more like caricaturization [R. VI, 29].

ARGUMENT.

I.

Certiorari Should Be Denied Because the Material in Question Constitutes Hard Core Pornography.

Because of its extreme character and because its sole appeal is to prurient interest, the book *Just For Kicks,* by Donna Powell should be denied constitutional protection. The sheer number of sexual acts described in this relatively short book is only one indication of the predominant appeal to the average reader. A box score of the sexual activity in the book indicates descriptions of the following activities:

23 acts of conventional intercourse, nine of which were in detail, the rest of which were described in part;

3 acts of anal intercourse;

12 lesbian acts, of which many were acts of oral copulation;

4 male homosexual acts, including oral copulation and masochism;

10 acts of masturbation by males and females, some with artificial phallic instruments;

5 acts of oral copulation between male and female;

1 orgy involving 4 to 6 persons, each with his body interlocked with one or more of the others, and all simultaneously engaging in oral copulation and various other acts of perversion;

1 sexual act between a female and a shetland pony.

The book describes approximately 60 sexual acts in 158 pages, not counting the many descriptions of "breast

fondling" (frequently between women). In light of this massive amount of sexual activity, it is difficult for one to conceive of any appeal other than a prurient appeal.

It is respectfully submitted to this Court that almost all people in the community would feel shock and surprise in reaction to the manner or means of description in the book, *Just For Kicks*. The fact that the manner or means of description is similar to the description of sexual activity in *Tropic of Cancer* and other books remains unimportant. Such books have not been accepted as an example of the customary limits of candor, as petitioner assumes. *Tropic of Cancer* may go substantially beyond the customary limits of candor in certain parts and still not be obscene for the reason that the book, taken as a whole, may have some other appeal or some social importance. Petitioner's logic that a book must be more extreme than *Tropic of Cancer* in order to be obscene simply is not and should not be a part of the obscenity standard. The trial court, the jury, and the expert witness all clearly held that *Just For Kicks* goes substantially beyond the customary limits of candor.

Justice Stewart, in a note to *Ginzburg v. United States*, 383 U.S. 463, 498, described hard core pornography as that type of writing verbally describing and "graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism and sometimes involving several participants in scenes of orgy-like character . . .". *Just For Kicks* falls within that description.

According to the expert witness, the book makes no effort at characterization; it indicates no study of

human nature, and no attempt is made to portray reality. No ideas are presented, no real story is told and no attempt is made to advance human knowledge or understanding in science, literature or art. Clearly, the book lacks literary merit and social importance.

Just For Kicks appears to be more extreme than the fifty books held obscene in *Mishkin v. New York,* 383 U.S. 502, 505. In describing those books, it was stated: "50 books are involved in this case. They portray sexuality in many guises. Some depict relatively normal heterosexual relations but more depict such deviations as sado-masochism, fetishism and homosexuality." Judged by its appeal to deviant groups or to the average person and when compared to the material in *Mishkin,* the evidence in this case supports a judicial finding that the book, independent of any pandering aspects, constitutes hard core pornography and is not protected by the First Amendment.

II.

Certiorari Should Be Denied Because Evidence of Pandering Requires a Finding That the Materials in Question Are Obscene.

As noted in Part I of the argument, it is contended that the materials in question are hard-core pornography on their face in light of the evidence presented at the trial. Assuming, without conceding, that if this Court were to conclude that the materials were not hard-core pornography, there is sufficient evidence of pandering to justify a finding that the materials in question are obscene. Such evidence of pandering may, in a close case, "be probative with respect to the nature of the material in question and thus satisfy the

Roth test." *Ginzburg v. United States,* 383 U.S. 463, 474.

As stated in *Ginzburg,* 383 U.S. at 475-476:

> Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitations through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

The book *Just For Kicks* was sold as a small part of a total operation designed for the "commercial exploitation of erotica, solely for the sake of its prurient appeal." In fact the petitioner indicated that this was exactly the reason that he offered this type of material for sale. He said to a police officer that ninety-nine percent of the people who entered his store wanted this particular type of book, implying that this is exactly the reason that books concerned only with sex and nudity were sold.

Considering as a group the names of the books appearing on the bookstand and which were thrust in the face of any child or adult walking into the store, together with the photographs of the store's interior, the "leer of the sensualist" clearly is shown in only a different form than that described in *Ginzburg v. United States,* 383 U.S. 463, 467. Some of the books were entitled as follows: *Three and One-Half Women, Queer Trap, Lust in Leather, Native Nymph, Lucious Lesbian, Hot Angel, Share My Wife, Satan Was a Lesbian,* and *Queer For a Day.* Such names, the pictures on the fronts, the excerpts on the backs of the

books and on the first inside pages are all examples of the "deliberate representations of petitioner's publication as erotically arousing" and of the type which stimulate the reader to accept them as prurient.[1]

III.

Certiorari Should Be Denied Where the State's Evidentiary Procedures Meet Constitutional Standards and Where No Substantial Federal Question Is Presented.

The evidence presented in the municipal court trial adequately supports the finding of obscenity. An expert witness called by the People was declared qualified by the judge and testified about all elements of the obscenity definitions. Moreover, the book itself was considered as evidence.

The State of California has power "to regulate procedures under which its laws are carried out, including the burden of producing evidence unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall,* 357 U.S. 513, 523. In First Amendment issues the state must only "provide procedures amply adequate to *safeguard* against invasion speech which the constitution protects." *Speiser v. Randall,* 357 U.S. at 524. California, in the case at bar, and by case law has provided sufficient safe-

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[1]It should be noted that the California Supreme Court recently indicated that the concept of pandering is not part of the California statutory scheme. See *People v. Noroff,* 67 Adv. Cal. 814, 816. Such a conclusion does not prevent this Court from deciding that under federal constitutional standards as established by this Court in *Ginzburg,* the matter is obscene even though such standards are not the basis upon which the state courts would draw this conclusion. See *Cooper v. California,* 386 U.S. 58, 61.

guards by providing that expert testimony may be introduced by the accused if he so desires. *People v. Williamson,* 207 Cal. App. 2d 839, 847, citing *Smith v. California,* 361 U.S. 147, 172. Requiring that such testimony be brought forth by the prosecution would not further safeguard a person's constitutional rights.

Petitioner's argument regarding the alleged need for expert witnesses does not present a constitutional issue under the First Amendment. Rather, petitioner raises due process issues by contending there is no evidence whatsoever to support the judgment. Clearly, the book itself is *some* evidence and thus the California procedure cannot be viewed as being one where the record is "entirely lacking in evidence" as was the case in *Thompson v. City of Louisville,* 362 U.S. 199, 204. Thus, in no respect has California offended a fundamental principle of justice such as to require a granting of certiorari.

Because the view of the average person is important in an obscenity case, experts are not needed to testify regarding the average person's feelings, any more so than an expert is needed to testify about the "reasonable man standard" in a negligence action. The jury itself, represents a cross-section of the community and can make a judgment in most situations. *Kingsley Books v. Brown,* 354 U.S. 436, 448, Justice Brennan dissenting; *Smith v. California,* 361 U.S. 147, 165, Justice Frankfurter concurring. *Just For Kicks* is easily understood by almost any adult or child and for that reason a jury can easily determine obscenity from the book itself. *Kahm v. United States,* 300 F. 2d 78, 84; *People v. Pinkus,* 256 Adv. Cal. App. Supp. 175, 180.

In many other situations the fact-finder must pass upon questions of prurient appeal and lewdness without

expert testimony of any kind. For instance, Section 647(a)1 of the California Penal Code requires a determination of the type of activity which annoys or molests a child (i.e., what is the appeal of the particular activity); Section 288 of the California Penal Code requires that the jury determine whether an act is lewdly committed and whether it is done with the intent of "arousing, *appealing to* or gratifying . . . lust or passion or sexual desires . . . (emphasis added)." See also, Sections 314.2 and 647(a) of the California Penal Code.

From the record presented to this court, no substantial federal question appears; certiorari should be denied.

IV.

Certiorari Should Be Denied Because the Evidence of Petitioner's Knowledge of the Book's Obscenity Supported the Jury's Verdict.

Section 311(e) of the California Penal Code requires that the defendant have knowledge that the material being sold is obscene. Clearly no person could be held to a standard of recognizing, in advance, that which will be held obscene as that term would be used by a court in a judicial proceeding. See *Ginzburg v. United States,* 383 U.S. 463, Justice Black dissenting. Rather, the trier of fact must find that the defendant knew the contents of the material and was "in some manner aware of its obscene character." *People v. Campise,* 242 Cal. App. 2d Supp. 905 (1966), disapproved on a different issue by *Flack v. Municipal Court,* 66 Adv.

Cal. 1035, 1047, footnote 2; *People v. Pinkus,* 256 Adv. Cal. App. Supp. 175, 184.

There has been no cause where this Court has required, on constitutional grounds, a state to sanction a particular mode of proof. *Smith v. California,* 361 U.S. 147, 172, Justice Harlan concurring and dissenting. "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." *Smith v. California,* 361 U.S. at 154.

The evidence presented at trial showed that the petitioner knew all the books he sold dealt with sex and nudity [R. V, 54]; that he had asked the publisher's route salesman if there was any chance of becoming involved with the law over the Satan Press Books (one of which is *Just For Kicks,* by Donna Powell) [R. II, 10, 7]; and that he knew one of the books described sexual relations between a pony and a woman [R. I, 10]. It further appeared that the petitioner kept some of the books behind the counter to read between waiting on customers [R. II, 11]; that the books were positioned so as to be visible to every passer-by and that according to a sign, "Adults Only" were to read these materials [Peo's Exs. 3B-C-D-I-H-G].

The petitioner testified that he had at no time read any of the books he sold [R. V, 47], that he had at no time kept books behind the counter [R. V, 38] and that

he had never read *Surf Broad* [R. V, 35]. The jury could not have reconciled such testimony with that of the publisher's route salesman who indicated he had seen the defendant keep books behind the counter [R. II, 11] and heard him call *Surf Broad* a "damned rough book." [R. II, 7]. Thus, the jury could have inferred that the petitioner was willfully false as to a material fact; such circumstance not only furnishes a ground for disbelieving other testimony of this defendant, "but also tends to show consciousness of guilt or liability on his part and has probative force in connection with other evidence on the issue of such guilt or liability. Such false testimony is in the nature of an admission from which, with other evidence, guilt or liability may be inferred". *People v. Wayne,* 41 Cal. 2d 814, 823; *People v. Osslo,* 50 Cal. 2d 75, 93.

The California courts have held that guilty knowledge may be inferred from circumstantial evidence. *People v. Wepplo,* 78 Cal. App. 2d Supp. 959, 966; *People v. Williamson,* 207 Cal. App. 2d 839, 846. It is the People's contention that there was ample evidence to support the " 'sufficient evidence' standard of review —requiring something more than merely any evidence but something less than substantial evidence on the record as a whole." *Jacobellis v. State of Ohio,* 378 U.S. 184, 203, Chief Justice Warren dissenting. Petitioner's argument regarding the sufficiency of evidence must be relegated to a violation of the Fourteenth Amendment, based on the contention that there is no evidence whatsoever supporting the judgment. *Thompson v. City of Louisville,* 362 U.S. 199.

V.

Certiorari Should Be Denied Because Evidence of Knowledge and Setting, Consisting of Samples of Books and Magazines Found in Petitioner's Store, Was Lawfully Seized Incidental to a Valid Arrest.

The samples of books found in the store by Investigator Tynes were seized for the probative value they would have to the jury and the court on the pandering issue and on the issue of knowledge. Clearly, the books were not seized because they were obscene or because they were contraband. The taking may fairly be classified as a seizure of instruments of the crime or as "mere evidence," either of which would be proper when incidental to a valid arrest. *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294; *United States v. Rabinowitz,* 339 U.S. 56; *People v. Thayer,* 63 Cal. 2d 635; *People v. Pinkus,* 256 Adv. Cal. App. Supp. 175.

Since only one to three copies of each of the many books in stock were taken, only a most strained sort of reasoning could lead one to find a system of "prior restraint," such as that which existed in *A Quantity of Books v. Kansas,* 378 U.S. 205, wherein all 1,715 copies were seized.

In a fact situation where seized books are not charged as obscene, the seizure should be viewed as being similar to the seizure of a non-contraband item which in and of itself provides evidence regarding some other issue, such as a note expressing a threat to kill in a murder case.

Conclusion.

This Court recently has reversed a number of decisions on the basis of *Redrup v. New York,* 386 U.S. 767. If this Court believes that there is any merit in the instant petition for writ of certiorari (and we contend there is none whatsoever), then this case should not be disposed of in as summary a fashion since, as distinguished from Redrup and its proneny, there was certain evidence of pandering. Furthermore, the material itself is more extreme than that passed upon by this Court in *Mishkin v. New York,* 383 U.S. 502; if there is to be any difference in result, the states should be offered some guidelines so that they can properly apply the constitutional distinctions found by this Court.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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